

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK\_\_\_\_\_  
CHAOTIC MOON, LLC,

Plaintiff,

v.

QWIKI, INC.,

Defendant.  
\_\_\_\_\_

Index No.: 650196/13

ANSWER AND  
COUNTERCLAIMS**DEFENDANT QWIKI, INC.'S ANSWER, AFFIRMATIVE DEFENSES, AND  
COUNTERCLAIMS TO PLAINTIFF'S COMPLAINT**

Defendant/Counterclaim Plaintiff Qwiki, Inc. ("Qwiki"), by and through its attorneys, as and for its Answer ("Answer") to the Complaint filed by Plaintiff/Counterclaim Defendant Chaotic Moon, LLC's ("Chaotic Moon"), and as and for its counterclaims ("Counterclaims") states as follows:

**NATURE OF THE CASE**

1. Paragraph 1 describes the nature of this action, to which no response is required. Qwiki specifically denies any allegations set forth in Paragraph 1.

**THE PARTIES AND RELATED PERSONS**

2. Qwiki lacks knowledge or information sufficient to form a belief as to Chaotic Moon's corporate structure and location. Qwiki denies the remaining allegations of Paragraph 2.

3. Qwiki admits that it is a Delaware corporation with its principal place of business in New York, New York. Qwiki created a mobile platform that facilitates a user's creation of video presentations from the pictures and videos on a user's phone.

## **JURISDICTION AND VENUE**

4. Admitted.

5. Admitted.

## **FACTUAL ALLEGATIONS**

### The Parties' Agreement and First Milestone

6. Qwiki entered into a contract with Chaotic Moon whereby Chaotic Moon was to assist Qwiki in building an iPhone application.

7. Denies the allegations set forth in Paragraph 7, except to refer the Court to the MSA and SOW for the terms thereof.

8. Denies the allegations set forth in Paragraph 8, except to refer the Court to the SOW for the terms thereof.

9. Admitted.

10. Denies the allegations set forth in Paragraph 10, except to refer the Court to the MSA and SOW for the terms thereof.

### Second Milestone

11. Denies the allegations set forth in Paragraph 11, except to refer the Court to the SOW for the terms thereof.

12. Denies the allegations set forth in Paragraph 12, except to refer the Court to the SOW for the terms thereof.

13. Denied.

14. Denied.

15. Denies the allegations set forth in Paragraph 15, except to refer the Court to the September 9, 2012 email sent by Bossola to Chaotic Moon for the contents thereof.

16. Denies the allegations set forth in Paragraph 16, except to refer the Court to the September 9, 2012 email sent by Bossola to Chaotic Moon for the contents thereof.

17. Admitted.

18. Qwiki admits that Chaotic Moon sent it an invoice on September 10, 2012 for \$60,000 but denies that the second milestone was completed and that payment was due.

#### Failure to Cooperate

19. Qwiki lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 19.

20. Denies the allegations set forth in Paragraph 20, except to refer the Court to the MSA for the terms thereof.

21. Denied.

22. Denied.

23. Qwiki admits that Chaotic Moon became increasingly combative and unproductive during the course of the parties' relationship. Qwiki denies the remaining allegations of Paragraph 23.

#### Third and Fourth Milestones

24. Denies the allegations set forth in Paragraph 24, except to refer the Court to the SOW for the terms thereof.

25. Denied.

26. Qwiki admits it provided "Beta" versions of its product to beta testers but denies the remaining allegations of Paragraph 26.

27. Denies the allegations set forth in Paragraph 27, except to refer the Court to the December 4, 2012 email sent by Bossola to Chaotic Moon for the contents thereof.

28. Denied.

29. Admitted.

30. Qwiki admits that Chaotic Moon sent it an invoice dated September 30, 2012 for the payment of \$85,000 but denies the completion of the third and fourth milestones and that payment was due.

Final Milestone

31. Denies the allegations set forth in Paragraph 31, except to refer the Court to the SOW for the terms thereof.

32. Denies the allegations set forth in Paragraph 32, except to refer the Court to the December 10, 2012 email sent by Bossola for the contents thereof.

33. Denies the allegations set forth in Paragraph 33, except to refer the Court to the December 10, 2012 email sent by Bossola to Chaotic Moon for the contents thereof.

34. Qwiki lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 34.

35. Admitted.

36. Denies the allegations set forth in Paragraph 36, except to refer the Court to the December 12, 2012 email sent by Imbruce to Chaotic Moon for the contents thereof.

37. Denies the allegations set forth in Paragraph 37, except to refer the Court to the December 12, 2012 email sent by Imbruce to Chaotic Moon for the contents thereof.

38. Admitted.

39. Qwiki admits that Chaotic Moon sent it an invoice dated September 30, 2012 for the payment of \$20,000 but denies the completion of the final milestone and that payment was

due. Qwiki admits that Chaotic Moon also sent it an invoice dated September 30, 2012 for reimbursement of travel expenses and that Qwiki has not paid that invoice.

40. Denied.

41. Qwiki lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 41.

42. Denied.

#### Payment Disputes

43. Denies the allegations set forth in Paragraph 43, except to refer the Court to the MSA for the terms thereof.

44. Denied.

45. Qwiki lacks knowledge or information sufficient to form a belief as to Paragraph 45.

46. Denies the allegations set forth in Paragraph 46, except to refer the Court to the December 17, 2012 letter sent by Qwiki to Chaotic Moon for the contents thereof.

47. Denies the allegations set forth in Paragraph 47, except to refer the Court to the MSA for the terms thereof.

48. Admitted.

49. Denies the allegations set forth in Paragraph 49, except to refer the Court to the December 31, 2012 letter sent by Qwiki via email for the contents thereof.

50. Denied.

51. Qwiki admits that the parties attempted to resolve this dispute outside of the litigation process. Qwiki denies the remaining allegations of Paragraph 51.

### **FIRST CAUSE OF ACTION**

#### **Breach of Contract**

52. Qwiki restates and incorporates by reference herein its Answers to Paragraphs 1 through 51.

53. Admitted.

54. Denied.

55. Denied.

### **SECOND CAUSE OF ACTION**

#### **Unjust Enrichment**

56. Qwiki restates and incorporates by reference herein its Answers to Paragraphs 1 through 55.

57. Denied.

58. Qwiki admits that it paid Chaotic Moon an initial payment but denies that Chaotic Moon provided Qwiki with work that required compensation.

59. Denied.

### **THIRD CAUSE OF ACTION**

#### **Account Stated**

60. Qwiki restates and incorporates by reference herein its Answers to Paragraphs 1 through 59.

61. Qwiki admits that Chaotic Moon sent it invoices on September 10 and September 30, 2012. Qwiki denies the remaining allegations of Paragraph 61.

62. Denied.

63. Denied.

64. Denied.

WHEREFORE, Qwiki denies that Chaotic Moon is entitled to any of the relief it seeks. Qwiki denies all factual allegations to which it otherwise did not respond.

### **QWIKI'S AFFIRMATIVE DEFENSES**

#### **FIRST DEFENSE**

65. Chaotic Moon's Complaint fails to state a claim upon which relief can be granted.

#### **SECOND DEFENSE**

66. Chaotic Moon's claims, in whole or part, are barred by the doctrines of estoppel, waiver, and/or laches.

#### **THIRD DEFENSE**

67. Chaotic Moon's claims, in whole or part, are barred in that they seek to hold Qwiki liable for the actions or omissions of third parties over whom Qwiki has no responsibility or control.

#### **FOURTH DEFENSE**

68. Chaotic Moon's claims, in whole or part, are subject to set-off or recoupment in that any recovery that Chaotic Moon could be awarded (which Qwiki denies would be appropriate) must be set off against any amounts due and owing to Qwiki.

#### **FIFTH DEFENSE**

69. Chaotic Moon's equitable claims, in whole or part, are barred by the doctrine of unclean hands and/or bad faith.

#### **SIXTH DEFENSE**

70. Chaotic Moon's claims, in whole or part, are barred due to Chaotic Moon's fraud.

#### **SEVENTH DEFENSE**

71. Chaotic Moon has failed to mitigate its alleged damages, if any.

#### EIGHTH DEFENSE

72. Chaotic Moon's causes of action are barred, in whole or in part, by its breach of the covenant of good faith and fair dealing.

#### NINTH DEFENSE

73. Chaotic Moon's claims are inconsistent with the course of dealings of the parties.

#### TENTH DEFENSE

74. The Complaint, and each and every purported cause of action alleged therein, is barred, in whole or in part, based upon documentary evidence. Additionally, Qwiki reserves the right to amend, modify, and supplement the foregoing defenses, or assert any additional defenses that may develop through discovery in this case.

#### **QWIKI'S COUNTERCLAIMS AGAINST CHAOTIC MOON**

Defendant/Counterclaim Plaintiff repeats and re-alleges the allegations contained in Paragraphs 1 through 74 as if they are fully set forth herein.

#### NATURE OF THE CASE

75. This is a breach of contract case stemming from Plaintiff/Counterclaim Defendant's failure to meet its obligations pursuant to an August 2012 contract between the parties.

#### PARTIES

76. Qwiki is, and at all relevant times was, a corporation organized under the laws of the State of Delaware, with its principal place of business in New York, New York.

77. Upon information and belief, Chaotic Moon is, and at all relevant times was, a limited liability corporation organized under the laws of the State of Delaware, with its principal place of business in Austin, Texas.



## FACTUAL BACKGROUND

78. Qwiki is a start-up company that developed a unique and proprietary algorithm that automatically detects and selects the best photographs and videos stored on a user's iPhone. The algorithm turns the selected media into brief, shareable high quality movies – complete with transitions and music selected either by the user or the algorithm.

79. Qwiki needed a partner for developing an iPhone application incorporating its technology (the “Qwiki app”), which was intended build upon award winning technologies previously launched for iPad users. The partner would be responsible for providing the “consumption environment” (i.e. “look and feel”) for the Qwiki app. More specifically, the partner was to provide design leadership, including the wireframes, user interface, and navigation aspects of the Qwiki app. For its part, Qwiki would handle the algorithm and related core functionality.

80. Chaotic Moon claims to specialize in developing mobile software. It touts itself as “the world’s most proven mobile application studio” that will “provide custom development on any platform to deliver [ ] a new application.”<sup>1</sup> Chaotic Moon further claims that, since its launch in 2010, it has worked with a variety of big-name clients, including Microsoft Games Studios, CBS Sports, News Corp., and Pizza Hut.<sup>2</sup>

81. The representations made in Chaotic Moon’s marketing materials as well as representations made by Chaotic Moon employees confirmed that Chaotic Moon could meet Qwiki’s demands for superior work product.

82. Chaotic Moon further offers what it calls the “Chaos Engine,” which is purportedly a software library of codes “developed specifically to allow clients and developers to

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<sup>1</sup> Chaotic Moon, About: Company, <http://www.chaoticmoon.com/company/> (last updated 2012).

<sup>2</sup> Chaotic Moon, Work: Our Clients, <http://www.chaoticmoon.com/work/clients/> (last updated 2012).

take advantage of the latest innovations without spending extra time or money.”<sup>3</sup>

83. Qwiki had several discussions with Chaotic Moon and Chaotic Moon assured Qwiki that it could provide high-quality functionality at a low cost, based on its experience and Chaos Engine, with a very quick turnaround time.

84. Qwiki hired Chaotic Moon, believing that Chaotic Moon could efficiently create the desired high-quality user interface using Chaos Engine coding, thus saving Qwiki both time and money.

85. On or about August 28, 2012, the parties signed the MSA. Under the MSA and SOW incorporated therein, Chaotic Moon would “take on a full partnership role in the project ‘Qwiki for iPhone’ outlined in exhibit A and B and from a management, creative and engineering perspective working in concert with the Qwiki engineering and executive team.”

86. Attached to the SOW as exhibits were two documents describing in detail how Qwiki intended for the Qwiki app to function – a “Qwiki for iPhone” Handout and a “Qwiki iPhone App: Design Goals and UI Walkthrough” handout dated August 17, 2012.

87. The SOW also outlined a timeline for the achievement of five “milestones.” Upon completion of a particular milestone, Qwiki was to pay Chaotic Moon according to a payment and terms schedule that corresponded generally with the milestone timeline.

88. Shortly after signing the MSA, Qwiki began encountering issues with Chaotic Moon.

89. Chaotic Moon’s work product was not acceptable. Qwiki uncovered a number of errors during the creation of the Qwiki app, including basic coding errors that should and could have been avoided.

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<sup>3</sup> Chaotic Moon, Our Products, <http://www.chaoticmoon.com/products/> (last updated 2012).

90. The anticipated completion deadline of October 12, 2012 passed without any significant progress in the Qwiki app's development.

91. By mid-November 2012, Qwiki app testers still reported numerous problems and low quality programming, rendering the Qwiki app completely unusable. Chaotic Moon employees could have and should have detected and addressed the errors.

92. Further complicating development was Chaotic Moon's refusal to send its employees to Qwiki's offices. Instead, the parties were forced to connect remotely, which caused additional delays. Indeed, Chaotic Moon's engineers did not come on-site until early December – nearly two months after the completion deadline.

93. Qwiki frequently complained, in writing and via phone, to Chaotic Moon regarding Chaotic Moon's sloppy development of the Qwiki app. Nevertheless, Qwiki also attempted to peaceably resolve the coding issues with Chaotic Moon.

94. Chaotic Moon would not or could not fix the errors. Instead, Qwiki employees were required to reconfigure the Qwiki app coding that Chaotic Moon delivered to Qwiki.

95. Chaotic Moon missed every single milestone deadline after the MSA's execution. Chaotic Moon ultimately failed to provide Qwiki with the requisite completed product.

96. Despite their failure to perform, Chaotic Moon delivered invoices to Qwiki according to the original milestone timeline. Chaotic Moon sent an invoice dated 9/10/12 for \$60,000.00 for "completion" of the second milestone. Chaotic Moon also sent Qwiki two invoices dated 9/30/12 for \$85,000.00 and \$20,000.00 for "completion" of the third and fourth milestones.

97. In December 2012, Qwiki hired a second development team to resolve the ongoing issues with the Qwiki app coding. The second team confirmed that Chaotic Moon's

work was poor. Ultimately, Qwiki re-wrote most of the coding that Chaotic Moon previously delivered to Qwiki.

98. After hiring the second team, Qwiki accordingly terminated the MSA. With the help of the second developer, Qwiki successfully launched the Qwiki app on February 7, 2012 – nearly four months after the anticipated completion date set forth in the MSA.

99. Qwiki continues to experience issues with the defective coding provided by Chaotic Moon, including frequent bug reports and crashes. In fact, Qwiki is still in the process of re-writing Chaotic Moon's substandard coding.

100. Prior to the Qwiki app's launch, Chaotic Moon initiated this action against its client, Qwiki, to recover amounts that Chaotic Moon alleges are owed to it for work that Chaotic Moon failed to perform.

#### COUNT I – BREACH OF CONTRACT

101. Qwiki repeats and re-alleges the allegations contained in Paragraphs 1 through 100 as if fully set forth herein.

102. As set forth above, Qwiki and Chaotic Moon entered into a valid contract, the MSA, whereby Chaotic Moon agreed to provide certain design and development services for the Qwiki app in exchange for payment by Qwiki.

103. Qwiki at all times performed the duties required of it pursuant to the MSA.

104. Section 4(f)(5) of the MSA provides that "the Services will be provided by Chaotic Moon in a professional and workmanlike manner equal to or better than industry standards."

105. Chaotic Moon failed, among other things, to provide reasonable services as required by Section 4(f)(5) of the MSA.

106. As a result of Chaotic Moon's breach, Qwiki suffered damages in an amount to be determined at trial, but believed to be not less than \$250,000.00.

107. Consequently, Qwiki should be awarded its actual and consequential damages in an amount to be determined at trial, plus interest at the maximum allowable rate, as well as reasonable attorneys' fees and costs pursuant to applicable statute or law.

#### COUNT II – FRAUDULENT MISREPRESENTATION

108. Qwiki repeats and re-alleges the allegations contained in Paragraphs 1 through 107 as if fully set forth herein.

109. Chaotic Moon knew that Qwiki needed a partner to quickly develop the consumption environment for the Qwiki app to meet Qwiki's anticipated October 12, 2012 deadline.

110. During the negotiations prior to the signing of the MSA, Chaotic Moon knowingly misrepresented that it would be able to meet Qwiki's aggressive timeframe because of its Chaos Engine library of codes.

111. Chaotic Moon used the Chaos Engine as leverage to convince Qwiki that it was the best candidate for assisting in the design and development of the Qwiki app.

112. Chaotic Moon intended for Qwiki to rely on Chaotic Moon's experience and expertise in selecting it to develop the consumption environment.

113. Qwiki hired Chaotic Moon to design the consumer platform for the Qwiki app based on Chaotic Moon's statements that it could use existing codes from the Chaos Engine to expedite the development process.

114. Despite the existence of the Chaos Engine, Qwiki encountered a number of problems and basic programming errors related to the coding provided by Chaotic Moon. Those issues impacted the quality and launch timing of the Qwiki app.

115. As a result of Chaotic Moon's misrepresentation, Qwiki suffered damages in an amount to be determined at trial, but believed to be not less than \$250,000.

116. Consequently, Qwiki should be awarded its actual and consequential damages in an amount to be determined at trial, plus interest at the maximum allowable rate, as well as reasonable attorneys' fees and costs pursuant to applicable statute or law.

WHEREFORE, Defendant Qwiki, Inc. prays that this Court entered judgment in favor of Qwiki and against Chaotic Moon 1) dismissing Chaotic Moon's Complaint with prejudice in its entirety; 2) granting Qwiki's counterclaims, awarding actual and consequential damages in an amount to be determined at trial, plus interest at the maximum allowable rate, as well as reasonable attorneys' fees and costs pursuant to applicable statute or law; and 3) granting such other and further relief as the Court deems just and proper.

Dated: New York, New York  
March 4, 2013

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